IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-134

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,
Respondents,

KROBLIN REFRIGERATED XPRESS, INC.

and

SCHANNO TRANSPORTATION, INC.
Intervenors.

BRIEF IN OPPOSITION OF INTERVENOR SCHANNO TRANSPORTATION, INC.

Anthony C. Vance
1300 Old Chain Bridge Road
McLean, Virginia 22101
Attorney for Schanno
Transportation, Inc.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-134

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,
Respondents,

KROBLIN REFRIGERATED XPRESS, INC.

and

SCHANNO TRANSPORTATION, INC.
Intervenors.

BRIEF IN OPPOSITION OF INTERVENOR
SCHANNO TRANSPORTATION, INC.

Intervening respondent Schanno Transportation, Inc. prays that the Petition for a Writ of Certiorari be denied.

QUESTION PRESENTED

Is the Interstate Commerce Commission's

finding that intervenors' services are required by the public convenience and necessity supported by adequate findings, substantial evidence, and based upon a rational exercise of its statutory power and all relevant factors?

STATEMENT OF THE CASE

Except to the extent indicated otherwise herein, intervenor Schanno concurs in petitioner's Statement.

The boiled-down basis for the Commission's certificate issuance to intervenors is twofold: (1) existing motor carriers have embargoed supporting forwarders' traffic, and (2) existing service is inadequate to meet the needs of supporting forwarders (Appendix, pp. 25a, 26a). The latter, coupled with the proposed service advantages of intervenors which are designed to meet supporting forwarders' needs, resulted in the Commission's ultimate finding of public convenience and necessity.

Petitioner sought review of the Commission's decision in the Court below on one asserted ground only, which is not ostensibly pursued herein:

> "Did the Interstate Commerce Commission err in issuing certificates . . . when the only evidence submitted in support of the applications for such certificates consisted of proof that the services

> so authorized were needed by certain regulated forwarders?" (Pet. Br. to U.S. Ct. App. D.C., pp. 1-2)

The Court of Appeals affirmed the Commission's decision in all respects, stating that the issues presented to the Commission involved "a combination of service and suitable rates" (Appendix, p. 5a). The Court found that forwarders were proper application supporters (Appendix, pp. 7a-8a).

ARGUMENT

Neither the decision below nor the Commission's decision <u>requires</u> any carrier to maintain special rates for Part IV carriers. Instead the Commission found that supporting forwarders needed FAK (freight-all-kinds) rates because they permit more efficient and expeditious forwarder service - such rates eliminate the necessity of rating and classifying the multitude of commodities supporting forwarders ship. Existing carriers' rate <u>structure</u> generally does not afford these advantages and their rate <u>level</u> is also seriously deficient since supporting forwarders could not use such and operate profitably. Supporting forwarders contacted over twenty existing motor carriers in an effort to secure the rate level and structure needed but to no avail (Appendix, pp. 8a, 9a, 25a, 26a). Thus, existing carriers are not interested in moving the traffic of forwarders, but instead, since petitioner's members

view forwarders as competitors, they desire to capture such traffic at existing motor carrier rates. Existing motor carriers want to deny the proposed service to forwarders in order to: (1) force the forwarders to take a loss while moving traffic via another mode, which they must by law, so that forwarders are ultimately driven out of business and existing motor carriers would then capture such traffic, or (2) force the forwarders to raise their rates, and thus compel small-shipment forwarder customers to pay a higher transportation charge, at least equal to motor carrier less-truckload rates, thereby improving motor carriers' competitive position. The Commission properly rejected such strategy and recognized this plan for what it was, i.e., an embargo. For years, the Commission has recognized, as here, that where an opponent maintained rates which were so high as to serve as a clear indication that disinterest was shown in particular traffic, and such opponent refused to negotiate and consider publishing lower rates, then an embargo was present and application approval was warranted under 49 U.S.C. §307. National Freight, Inc. Ext., 110 M.C.C. 433, 434-35 (1969); J.E.M. Transp. Co. Ext., 94 M.C.C. 573, 576-77 (1964); Edwards Ext., 88 M.C.C. 318 (1961); Ewell Ext., 72 M.C.C. 645 (1957); United Parcel Service Com. Carr. Appl., 68 M.C.C. 199, 203-04 (1956); McBride Ext., 62 M.C. C. 779 (1954), among others. Thus, forwarders' needs in this regard, and existing carriers' refusal to fulfill such, in

the circumstances cited, resulted in one basis for the Commission's ruling.

The Court below properly affirmed the Commission's rationale concerning this basis for approval. It is well established that the factor of rates may be considered in a case of the instant type when a supporter, which has been using one mode (rail), seeks to obtain the benefits of another mode (motor). Schaffer Transportation Co. v. United States, 355 U.S. 83, 89, 92 (1957); see also ICC v. J-T Transport, 368 U.S. 81, 91-93 (1961). A supporter cannot be denied the benefits of the second mode offering lower rates even if other carriers will lose traffic. Schaffer Transportation Co. v. United States, supra at 91-92. The same principles apply here a fortiori since opponents have not even proven that they will lose any traffic previously handled by them (Appendix, pp. 20a, 25a). Furthermore, it has been previously ruled that the Commission has broad discretion under 49 U.S.C. §307 in determining whether the public convenience and necessity warrant the requested certification. Schaffer Transportation v. United States, supra at 88; ICC v. Parker, 326 U.S. 60, 65 (1945); cf., United States v. Detroit & Co. Nav. Co., 326 U.S. 236, 241 (1945); United States v. Pierce Auto Frt. Lines, 327 U.S. 513, 531-32 (1946). In fact, there is a presumption that the Commission has performed its official duties properly. ICC v. Jersey City, 322 U.S. 503, 512 (1944). In sum, whether the existing

motor carrier rate structure and level, in the instant circumstances, should have been a factor in the issuance of certificates to intervenors is clearly a matter within the discretionary expertise of the Commission, which has been soundly exercised here.

Secondly, and contrary to petitioner's contention (p. 7), the Commission found, and the Court below affirmed (Appendix, p. 8a), that, aside from the embargo issue, "a grant of authority is warranted on grounds of inadequate existing service" (Appendix, p. 26a), which finding is not contested herein and was not questioned in the Court below. This finding of inadequacy alone, coupled with the other relevant favorably 49 U.S.C. §307 findings made and not contested, is enough to warrant certificate issuance - in fact, compliance with a lesser burden is sufficient. Schaffer Transportation v. United States, supra at 90; Davidson Transfer & Storage Co. v. United States, 42 F. Supp. 215, 219, 220 (E.D. Pa.), aff'd 317 U.S. 587; Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (D. N.H., 1964); Lemmon Transport Co. v. United States, 393 F. Supp. 838, 842 (W.D. Va., 1975); Yellow Forwarding Co. v. United States, 369 F. Supp. 1040, 1045 (D. Kans., 1973); Feature Film Service v. United States, 347 F. Supp. 191, 201-02 (S.D. Ind., 1972); Younger Bros. v. United States, 289 F. Supp. 545, 547-48 (S.D. Tex., 1968). Since this aspect of the Commission's decision, and the Court's affirmance

thereof, is enough in and of itself to justify certificate issuance, review is clearly unwarranted. Thus, the decision below is clearly correct without regard to the question sought to be reached by petitioner.

CONCLUSION

The decision below should not be reviewed since the question posed is unsubstantial, there is an absence of conflict in decisions, and the decision below is plainly correct. Accordingly, intervening respondent respectfully moves that the petition be denied.

Respectfully submitted,

Anthony C. Vance
Attorney for Respondent
Schanno Transportation, Inc.

Dated: August 24, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 1977, three copies of the Brief in Opposition of Intervenor Schanno Transportation, Inc. were mailed postage prepaid to: Robert C. Lawrence, Esq., Room 5109, Interstate Commerce Commission, Washington, D. C. 20423; Solicitor General, Department of Justice, Washington, D. C. 20530; Thomas R. Kingsley, Esq., Attorney for Intervenor Kroblin Refrigerated Xpress, Inc., 1819 H Street, N.W., Washington, D. C. 20006; Homer S. Carpenter, Esq., Rice, Carpenter and Carraway, 501 Perpetual Bldg., 1111 E Street, N.W., Washington, D. C. 20004; and Keith G. O'Brien, Esq., Attorney for Petitioner, 1616 P Street, N.W., Washington, D. C. 20036. I further certify that all parties required to be served have been served.

Anthony C. Vance
1300 Old Chain Bridge Road
McLean, Virginia 22101
Attorney for Schanno
Transportation, Inc.